

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the matter of

Implementation of the Satellite Home
Viewer Improvement Act of 1999

Broadcast Signal Carriage Issues

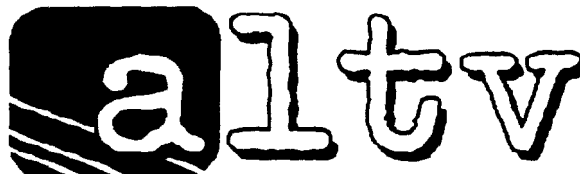
CS Docket No. 00-96

RECEIVED

AUG 4 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

COMMENTS OF
THE ASSOCIATION OF LOCAL TELEVISION STATIONS, INC.



James J. Popham
Vice President, General Counsel
Association of Local Television
Stations, Inc.
1320 19th Street, N.W.
Suite 300
Washington, D.C. 20036
(202) 887-1970

July 14, 2000

No. of Copies rec'd 019
List ABCDE

Summary

Two avenues beckon the Commission. It can adopt rules that partially or wholly eviscerate the local carriage requirements of the Act. Or it can adopt rules faithful to the Act and its purposes – rules that provide for carriage of all local television stations’ without discrimination in any way, shape, form, or manner. Preventing discriminatory treatment of local television stations is the heart of the local carriage requirements in the Act. It flows from Congress’s long-held view that discriminatory carriage of local stations in a market is destructive of the system of free, over-the-air broadcast service and Congress’s well-founded fear that satellite carriers would carry only the signals of major network affiliates. To prevent discrimination against local television stations, Congress enacted not only the carry-one, carry-all requirement, but also nondiscriminatory channel positioning requirements and other requirements paralleling those that prohibit cable television systems from discriminating against or among local stations.

At the same time, Congress appreciated that satellite carriers’ existing facilities and technologies had been designed to provide nationwide distribution of program channels rather than localized transmission of the signal of a local television station only to households within its home market. It understood that satellite carriers could assign only limited capacity to carriage of local signals in the short-run and that building and launching new satellite facilities to implement local-into-local service inclusive of all local signals required considerable lead time. Therefore, instead of immediate imposition of a must-carry requirement like that applicable to cable systems, Congress embraced a carry-one, carry-all approach for satellite carriers and deferred application of the rule until January 1, 2002. Even then, the carry-one, carry-all provision

requires no satellite carrier to undertake the burden of providing local-into-local service in any market or markets. It contemplates the gradual expansion of local-into-local service as satellite carriers launch new satellites and employ improved technologies (e.g., spot beams, Ka band, etc.). Thus, Congress has mandated a local carriage regime that prevents discriminatory treatment of local television stations, while remaining mindful not only of the benefits of enhanced competition to cable television, but also of the need to avoid expecting the impossible from satellite carriers.

ALTV, which represents the interests of the many local television stations most likely to be victims of discriminatory treatment, posits adoption of rules rooted most deeply in the congressional imperative to foreclose discriminatory treatment of local television stations by satellite carriers. The proposed rules would assure that satellite carriers may exploit their statutory copyright subsidy in a manner that respects congressional insistence that local television service and its myriad of public benefits are preserved.

Channel Positioning: The signals of all local television stations, including retransmission consent stations, must be provided on contiguous channels. The plain language of section 338, as well as its underlying purpose, and sound policy considerations, require no less. Furthermore, all local signals should be included in a single package. This would prevent prohibited discrimination, preserve competitive parity, and provide convenient accessibility to all signals. Similarly, no new equipment should be required to access some, but not all of the local signals in a market. These requirements would be especially significant in 2002 to newly carried stations that would suffer considerable discriminatory impact if they were not included in the

same package as already-carried stations or were not readily accessible with the same equipment. For the same reasons, any discrimination in program or feature access via menus and electronic program guides must be prohibited.

Delivery of a good quality signal: Here the cable television rules provide ample precedent for the satellite rules. Thus, for example, delivery of good quality off-air signal, as defined in the cable rules, to a satellite carrier's designated local receive facility will satisfy a station's obligation. Satellite carriers must notify stations that they fail to provide a good quality signal and provide test and measurement data to support their claim. These and other interpretations of the cable provisions readily and easily apply to satellite carriers. The Act does require different treatment in several significant respects, however. First, a satellite carrier may insist that a station cover the costs of delivering a good quality signal, but may not refuse to carry the station just because a good quality signal is not available at its receive facility. Second, the local receive facility must be in the station's local market. However, a station may be required to bear the cost of delivering a good quality signal to an out-of-market site if half the local stations electing carry-one, carry-all, rather than retransmission consent, agree to the alternate site.

Material Degradation: The Commission should prohibit use of any technical means of enhancing capacity that degrades picture quality. Permitting satellite carriers to use a variety of signal processing techniques to conserve capacity hardly need be read to clash with the basic prohibition of material signal degradation. Thus, the Conference Report language extends no valid invitation to the Commission to allow use of processing techniques that cause material degradation to local television stations' signals. Indeed, no additional action is called for to address

satellite carriers' concerns about limited capacity. Congress already addressed those concerns. It enacted no strict must-carry requirement and gave satellite carriers over two years to expand capacity – which they now have undertaken. Otherwise, the rules should prohibit any discrimination against local television stations in terms of picture quality.

Carriage Obligations and Definitions: A carry-one, carry-all election should be considered a request for carriage. This provision and other necessary requirements for notification and response mesh easily into the retransmission consent-carry-one, carry-all election process.

Content to be Carried: The Commission should apply the present cable provisions in a straightforward manner. No reason exists to alter them for satellite carriers.

Market definitions: The rules should allow for use of the same Nielsen data by cable systems and satellite carriers as quickly as practicable. This embraces competitive parity, maintains accuracy, and minimizes confusion.

Duplicating signals: Duplicating signals should be defined alike for cable systems and satellite carriers. Again, regulatory parity commands the same result. However, sound reasons exist to exclude emerging networks that provide a more minimal program schedule than the established networks. First, section 338 includes no applicable definition of network. Second, the level of duplication is relatively minimal compared to major network affiliates. Third, this is another instance where the impact of the provision on a local emerging-network-affiliated station excluded by the rule would be much more significant in the case of a satellite carrier. If a station is

denied carriage by a satellite carrier, it is denied carriage throughout the entire market. No satellite subscribers will have access to its signal, even if they live in the station's community of license.

Remedies: The remedy for an outright failure to carry is a copyright infringement suit. Other violations should be addressed in the Commission's complaint process. However, a satellite carrier may remedy a station's failure to bear the costs of delivering a good quality signal via private litigation.

Progress Reports: Satellite carriers should advise the FCC every six months of progress towards deployment of facilities to comply with section 338 by January 1, 2002. Semi-annual progress reports would prevent the same sort of shenanigans that has bedeviled the legislative process since SHVA was enacted in 1988. It would allow no satellite carrier to hide its own failure to anticipate the requirements of section 338. At the same time, it would pose no appreciable burden on satellite carriers, which routinely tout their plans and accomplishments to the press, their shareholders, Wall Street analysts, and their customers.

Digital television: Application of the carry-one, carry-all rule to local television stations' digital signals would implement section 338 faithfully, while promoting Congress's and the Commission's goal for digital television. If applied separately to digital and analog signals, it also would avoid imposing enormous new costs on satellite carriers. Only if a satellite carrier

already had demonstrated its ability to carry digital signals by retransmitting a local station's digital signal in a market would the obligation to carry all stations in the market attach.

When all is said and done, no lax interpretation of the Act may be countenanced. The Commission must not risk eviscerating by rule what Congress has ordained by statute.

Table of Contents

I.	Introduction.....	1
A.	Congress has forbidden any form of discrimination in carriage against a local television station.	2
B.	Congress already has taken into account the pertinent distinctions between cable television systems and satellite carriers.	7
II.	Channel Positioning.....	10
A.	Satellite carriers must provide the signals of all local television stations on contiguous channels.....	10
1.	The Act expressly requires carriage on contiguous channels.....	11
2.	All local television stations – including retransmission consent stations – must be carried in the same contiguous channel line-up.	11
a.	The plain language of Section 338 refers to local television broadcast stations without distinction.....	11
b.	In addition to being semantically impossible, reading retransmission consent stations out of the reference to and definition of local station in Section 338(d) would confound Congressional intent.	12
c.	Sound public policy considerations support interpreting section 338 to encompass all television stations.	15
B.	All local television stations must be provided to satellite subscribers in the same package.	16
C.	The rules should prohibit satellite carriers from requiring consumers to acquire and/or install additional equipment in order to receive the signals of some local stations.....	19
D.	The signals of all local television stations must be accessible to subscribers on precisely the same basis in any navigational device, program guide or menu.....	22
III.	Broadcast station delivery of a good quality signal.	23
A.	A local television station should be required to bear none of the costs of delivering a good quality signal to a satellite carrier if a good quality signal from the station is available off-the-air at the site of the satellite carrier’s designated local receive facility.....	24

B.	The Commission should import the cable definition of a good quality signal into the satellite rules.	25
C.	The Commission should interpret the good quality signal requirement for satellite carriers as it has interpreted the provision for cable systems.....	26
D.	Provision of a good quality signal is not a prerequisite to satellite carriage, as it is in the case of cable carriage.....	28
E.	A satellite carrier's local receive facility must be located in the station's local market.....	31
F.	A local television station may be required to bear the costs of delivering a signal to a location other than the satellite carrier's designated local receive facility only if one-half of the local stations electing carry-one, carry-all carriage in that market agree to another signal delivery site.....	31
G.	Satellite carriers must advise stations of the location of their designated local receive facility no later than their initial notice that they intend to commence local-into-local service in a market.....	33
IV.	Material degradation.....	34
A.	The Commission should prohibit use of any technical means of enhancing capacity that degrades picture quality	34
B.	The Commission must prohibit any picture quality discrimination against local television stations.....	36
V.	Carriage obligations and definitions	37
A.	Election of carry-one, carry-all status should be considered a request for carriage.	37
B.	The additional requirements imposed by section 338 mesh easily into the overall retransmission consent election implementation scheme.....	38
VI.	Content to be carried.....	43
VII.	Market definitions.....	44
VIII.	Duplicating Signals.....	44
IX.	Remedies.....	46
A.	Noncarriage is copyright infringement.	46

B.	All other matters are subject to FCC complaint process.....	47
C.	Private action is remedy for failure to pay costs of delivering good quality signal.	48
X.	Progress reports	48
XI.	Digital television	50
XII.	Conclusion.....	52

**Before the
Federal Communications Commission
Washington, D.C.**

In the matter of

Implementation of the Satellite Home
Viewer Improvement Act of 1999

Broadcast Signal Carriage Issues

CS Docket No. 00-96

**COMMENTS OF
THE ASSOCIATION OF LOCAL TELEVISION STATIONS, INC.**

I. Introduction

Two avenues beckon the Commission.

It can adopt rules that partially or wholly eviscerate the local carriage requirements of the Act – rules that would

- require carriage, but allow less convenient or more costly access to some local signals;
- require carriage, but only if a local station could afford to pay thousands of dollars to cover the costs of delivering its signal to a satellite carrier's far-flung receive facility; and/or
- require carriage, but provide no assurance that a local television station's picture and sound quality were as good as other stations.'

Or...

It can adopt rules faithful to the Act and its purposes – rules that provide for carriage of all local television stations’ without discrimination in any way, shape, form, or manner.

The Commission will have remained faithful to the statute and the underlying congressional intent only if it travels the latter course.

A. Congress has forbidden any form of discrimination in carriage against a local television station.

Preventing discriminatory treatment of local television stations is the heart of the local carriage requirements in the Act. It flows from Congress’s long-held view that discriminatory carriage of local stations in a market is destructive of the system of free, over-the-air broadcast service. And Congress consistently has sought to preserve local television service for the benefit of the viewing public – including those who rely exclusively on the free service provided by their local television stations. Thus, in establishing must-carry rules for cable television systems in 1992, Congress fully realized that

Broadcasters who lose substantial portions of their audience will be unable to continue to provide local public service programming, and may be forced to discontinue service altogether. That result would not only lead to diminished diversity of opinion, but also to reduced competition in the local video market and the strengthening of a cable systems’ dominant position in providing video services, contrary to the strong governmental interest in fostering active competition.²

¹H.R. Rep. 102-628, 102d Cong., 2d Sess. 64 (1992).

² *Id.*

Even then Congress was concerned as much about “incremental weakening” of local television stations that results from “discriminatory carriage conditions” as it was by “wholesale” lack of carriage.³ In either event, Congress knew that the affected local television stations faced “losing their ability to compete in a competitive programming market.”⁴ More to the point, Congress left no local television station vulnerable to the unilateral discriminatory whims of cable operators in its market.⁵ The must-carry and channel positioning rules essentially required carriage of all local television stations in a market, not just a core group of the most popular stations.⁶ Only by assuring that no local television station suffered any debilitating, much less fatal, harm from discriminatory treatment by a cable operator could Congress effectively preserve the diversity of voices local television stations provide to cable subscribers and non-subscribers alike.⁷

Last year Congress surveyed a similar landscape and adopted similar rules for satellite carriers.⁸ It acknowledged, again, that local “television broadcast stations

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Turner Broadcasting Company v. Federal Communications Commission*, 1997 LEXIS 2078, 23-24 (1997)[hereinafter cited as *Turner II*].

⁷ H.R. Rep., *supra*, at 64-65.

⁸ H.R. Rep. 106-86, 106th Cong., 1st Sess. 16 (1999) (“H.R. 1027 creates must-carry obligations for satellite carriers retransmitting television broadcast signals as a condition of the copyright license. The provisions are similar to those applicable to the cable industry.”); S. Report 106-51, 106th Cong., 1st sess., at 6 (“To assure that satellite television subscribers have the same access to local off-air television stations as cable television systems, the bill would also require direct-to-

provide valuable programming tailored to local needs, such as news, weather, special announcements and information related to local activities.”⁹ Again, it was concerned that some stations might suffer discriminatory treatment – that “absent must-carry obligations, satellite carriers would carry the major network affiliates and few other signals.”¹⁰ Left deprived of access to their audience would be affiliates of emerging networks, independent stations, foreign-language stations, and other stations with more specialized program formats.¹¹ Indeed, Congress’s prescience has been confirmed by the fact that today’s local-into-local satellite service typically excludes carriage of local television stations other than the four major network affiliates and, occasionally, “a few other signals.”¹²

This discrimination among local television stations was anathema to Congress. It observed that, “Non-carried stations would face the same loss of viewership Congress previously found with respect to cable noncarriage.”¹³ Thus, as it had in the case of cable, Congress established rules “intended to preserve free television for those not

home satellite service providers to comply with the must-carry rules that apply to cable television operators no later than January 1, 2002.”); Joint Explanatory Statement of the Committee of Conference, 145 CONG. REC. S14708 (daily ed. November 17, 1999) [hereinafter cited as “Conf. Rep.”] (“[I]t is important that the satellite industry be afforded a statutory scheme for licensing television broadcast programming similar to that of the cable industry.”).

⁹ Conf. Rep. at S14708.

¹⁰ Conf. Rep. at S14711.

¹¹ Hearing on Reauthorization of the satellite Home Viewer Act before the Subcommittee on Telecommunications, Trade, and Consumer Protection, 106th Cong., 1st Sess. 62 (1999) (statement of Al DeVaney) [hereinafter cited as “DeVaney”].

¹² Conf. Rep. at S14711.

served by satellite or cable systems and to promote widespread dissemination of information from a multiplicity of sources.¹⁴ In particular, Congress established the requirement that a satellite carrier that provides local-into-local service in a market provide the signals of all local television stations that request carriage (*i.e.*, stations that did not elect carriage via retransmission consent) in that market. Congress understood that a satellite carrier's preventing a local television station from reaching its viewers would "undermine" Congress's long-standing "interest in maintaining free over-the-air television."¹⁵

The carry-one, carry-all provision – the core element of the local carriage provisions of the Act – defines the essential thrust of the statute to prevent discriminatory treatment of local television stations by satellite carriers. It prevents satellite carriers from "choosing to carry only certain stations and effectively preventing many other local broadcasters from reaching potential viewers in their service areas."¹⁶ But Congress knew that other less blatant forms of discrimination also would effectively deny a local station access to its audience. Therefore, Congress also endeavored to prevent other forms of discrimination against local television stations in the Act. It required satellite carriers to position local television signals "in a way that is convenient

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

and practically accessible for consumers.”¹⁷ Among the provisions “illustrative of this general requirement” is the specific obligation to carry all local television on contiguous channels, thereby averting discriminatory assignment of some local television stations’ signals to obscure or inconvenient channel positions. Provisions expressly banning price discrimination and access discrimination round out the anti-discrimination provisions with respect to channel placement.¹⁸

Congress’s anti-discrimination agenda is further authenticated and effectuated in the provision applying the same prohibition against material degradation of local stations’ signals as it already had applied to cable systems.¹⁹ That provision of the Cable Act was designed to prevent discrimination against local television stations’ signals by requiring that “the quality of signal processing and carriage provided by a cable system for the carriage of local commercial television stations will be no less than that provided by the system for any other type of signal.”²⁰ Again, the central theme proclaimed in this provision is Congress’s abhorrence for any form or manner of discrimination against a local television retransmitted by a satellite carrier.

Also in this vein, Congress included a provision to minimize the risk of harmful discrimination with respect to the assessment against local television stations of the

¹⁷ *Id.*

¹⁸ *Id.*; 47 U.S.C. §338(d).

¹⁹ 47 U.S.C. §338(g).

²⁰ 47 U.S.C. §614(b)(4)(A).

costs of delivering a good quality signal to the satellite carrier's local receive facility. The general rule requires that the facility be located in the station's local market, assuring that no local station faces prohibitive costs in delivering a good quality signal to the satellite carrier. The only exception to the rule permits a satellite carrier to assess costs of delivering a good quality signal to a receive facility outside the local market only where at least half of the local stations electing carry-one, carry-all status have found the out-of-market site acceptable. Again, the risk that any particular local station will confront signal delivery costs out-of-line with those charged other stations in the market is minimized. This requirement, again, boldly reflects the consistent underlying intent of Congress to prevent discrimination against any local television station.

Thus, Congress at every turn has forbidden satellite carriers to discriminate in any way against any local television station. The Commission, therefore, must honor this mandate rigorously in every aspect of its rules implementing section 338.

B. Congress already has taken into account the pertinent distinctions between cable television systems and satellite carriers.

Congress also sought to institute a regulatory regime that embraced comparable, but hardly identical treatment of satellite carriers and cable television systems. It recognized that fostering competition between cable systems and satellite carriers would be most beneficial if both competitors operated under similar rules²¹. At the same time, Congress took account of distinctions between the two media. It appreciated that

satellite carriers' existing facilities and technologies had been designed to provide nationwide distribution of program channels rather than localized transmission of the signal of a local television station only to households within its home market. Consequently, satellite carriers could assign only limited capacity to carriage of local signals in the short-run.²² Otherwise, Congress appeared skeptical of satellite carriers' alleged capacity woes.²³ And while it understood that building and launching new satellite facilities to implement local-into-local service inclusive of all local signals required considerable lead time, Congress was confident those capacity shortfalls could be remedied by 2002.²⁴ Therefore, instead of immediate imposition of a must-carry requirement like that applicable to cable systems, Congress embraced a carry-one, carry-

²¹ Conf. Rep. at S14708.

²² *Id.* ("Because of unique technical challenges on satellite technology and constraints on the use of satellite spectrum, satellite carriers may initially be limited in their ability to deliver must carry signals into multiple markets.") ; S. Rep. 106-51, 106th. Cong, 1st. Sess. 13-14 (1999) ("Given the tremendous number of satellite transponders that would be required to enable direct-to-home satellite service providers to beam all local signals into the markets they serve today, requiring satellite television providers to comply with must-carry rules now would impose an impossible burden incompatible with their ability to continue to compete in the multichannel video marketplace.")

²³ H.R. Rep. 106-79, 106th. Cong. 1st. Sess. 4 (1999) ("But digital compression and 'spot beam' technology have advanced to the point where satellite carriers have enough capacity to carry many (if not all) local broadcast signals from around the country. The Subcommittee received testimony from two satellite carriers – Local TV on Satellite, and EchoStar – that, within a couple of years, plan to provide consumers living in numerous cities with access to their local broadcast stations via satellite. Satellite television, in other words, now has the technological ability to offer consumers a complete substitute for incumbent cable offerings.").

²⁴ S. Rep. 106-51, *supra*, at 14 ("The date January 1, 2002, was selected because it is the earliest date estimated by which Capitol Broadcasting, a company formed by broadcasters for the express purpose of making local broadcast signals available to direct-to-home satellite service providers for satellite carriage into local markets, will be able to offer its proposed service.").

all approach for satellite carriers and deferred application of the rule until January 1, 2002.

The beauty of the carry-one, carry-all requirement is its market-by-market approach.²⁵ It requires no satellite carrier to undertake the burden of providing local-into-local service in any market or markets. It applies only where a satellite carrier has elected to provide local-into-local service relying on the royalty-free statutory copyright license. Thus, it contemplates the gradual expansion of local-into-local service as satellite carriers launch new satellites and employ improved technologies (g., spot beams, Ka band, etc.).

Thus, Congress has mandated a local carriage regime that prevents discriminatory treatment of local television stations, while remaining mindful not only of the benefits of enhanced competition to cable television, but also of the need to avoid expecting the impossible from satellite carriers.

ALTV, which represents the interests of the many local television stations most likely to be victims of discriminatory treatment, responds to the Commission's *Notice of Proposed Rule Making*²⁶ with the following proposals. They are rooted most deeply in the congressional imperative to foreclose discriminatory treatment of local television stations by satellite carriers. They also embrace the Act's contemplation of competitive

²⁵Conf. Rep. at S14711.

parity as well as the meaningful distinctions between cable television systems and satellite carriers. Ultimately, ALTV's proposals would assure that satellite carriers may exploit their statutory copyright subsidy in a manner that respects congressional insistence that local television service and its myriad of public benefits are preserved. Therefore, ALTV respectfully urges the Commission to adopt the rules delineated below.

II. Channel Positioning

The carry-one, carry-all requirement will have little benefit if the signals of some local television stations are less conveniently accessible than others. ALTV submits that the following rules ought to be adopted by the Commission to implement faithfully the statutory carriage and positioning provisions in the Act:

A. Satellite carriers must provide the signals of all local television stations on contiguous channels.

The Commission must adopt rules that require that all local television stations be made available to subscribers on contiguous channels. A contiguous channel requirement not only is mandated by the Act, but also is consistent with spirit and purposes of the Act.

²⁶*Notice of Proposed Rule Making*, CS Docket No. 00-96 (released June 9, 2000) [hereinafter cited as *Notice*].

1. The Act expressly requires carriage on contiguous channels.

The Commission correctly interprets Section 338(d) of the Act to require that satellite carriers “present local broadcast channels to subscribers in an uninterrupted series.”²⁷ The statute may be read no other way. It states that “the satellite carrier shall retransmit the signal of the local television broadcast stations to subscribers in the stations’ local market on contiguous channels....”²⁸ The Commission rightly considers this a clear statutory directive.²⁹

2. All local television stations – including retransmission consent stations – must be carried in the same contiguous channel line-up.

- a. *The plain language of Section 338 refers to local television broadcast stations without distinction.*

The plain language of the Act mandates carriage of all local television stations in the same “uninterrupted series.”³⁰ The language of Section 338(d) is clear and unambiguous. It states that “the satellite carrier shall retransmit the signal of the *local television broadcast stations* to subscribers in the stations’ local market on contiguous channels.”³¹ The section makes no distinction between signals carried pursuant to Section 325 and signals required to be carried by Section 338. It refers simply to “local television broadcast stations.”³² Furthermore, in referring to the station’s “local

²⁷Notice at ¶29.

²⁸47 U.S.C. §338(d).

²⁹Notice at ¶29.

³⁰Notice at ¶29.

³¹47 U.S.C. §338(d) [emphasis supplied].

³² 47 U.S.C. §338(d).

market,” Section 338(d) refers inclusively to “all commercial television broadcast stations licensed to a community within the same designated market area.”³³ Again, the definition makes no distinction based on mode of carriage.³⁴ Lastly, unlike Section 338(a)(1), which embodies the basic carry-one, carry-all requirement, Section 338(d) is not “subject to Section 325(b).”³⁵ Thus, whereas Section 338(a)(1) expressly denies retransmission consent stations the benefit of carriage upon request, section 338(d) is not subject to Section 325(b) and contemplates no differentiation between retransmission consent carry-one, carry-all stations. Thus, the plain language of section 338, and section 338(d) in particular, requires satellite carriers to place all local television stations on contiguous channels. No further analysis is required.³⁶

- b. In addition to being semantically impossible, reading retransmission consent stations out of the reference to and definition of local station in Section 338(d) would confound congressional intent.*

Congress sought to prevent local television stations from suffering discriminatory treatment. Placing popular retransmission consent stations adjacent to popular cable networks, while relegating carry-one, carry-all stations to distant channel numbers “north” of pay-per-view and foreign channels would epitomize the

³³*Id.*

³⁴17 U.S.C. §122(j)(2)(A)(I), as referred to in 47 U.S.C. 338(h).

³⁵47 U.S.C. §338(a)(1).

³⁶*Blum v. Stenson*, 465 U.S. 886, 896 (1984) (“[W]here resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear.”); *National Credit Union Administration v. First National Bank & Trust Co. et al.*, Nos. 96-843 and 96-847, 1998 U.S. LEXIS 1448; 66 U.S.L.W. 4134, 41 (decided February 25, 1998); *Quality King Distributors, Inc.*,

discrimination Congress sought to prevent. Section 338, therefore, hardly may be read to allow such harmful discrimination. Indeed, the provision becomes essentially meaningless and counterproductive if it requires no more than that the weakest stations be grouped together.

Second, Congress sought to assure that local stations were positioned “in a way that is convenient and practically accessible for subscribers.”³⁷ Permitting satellite carriers to banish any local television stations to isolated ghettos or channel “Siberia” would flout this directive. Satellite subscribers would be especially disadvantaged in tuning exiled local stations because satellite carriers do not carry stations on their off-air channel numbers or even use the familiar channel map of broadcast and cable television. More than inconvenience could be involved in situations where viewers were seeking access to local weather bulletins or other emergency information on a local station. In any event, consumers never ought be forced to embark on a grazing pilgrimage – even on an electronic program guide – just to find a local station’s signal. Therefore, to achieve what Congress intended in section 338(d), the provision must be read to require that all local television stations be carried on contiguous channels.

Third, placing some local television stations at disadvantageous channel positions, while according other stations more favorable placement would mock the regulatory and competitive parity between cable systems and satellite carriers Congress

v. *L'Anza Research International, Inc.*, No. 96-1470, 1998 U.S. LEXIS 1606 (decided March 9, 1998).

strove to engender in the Act. Congress saw the satellite channel positioning requirement as generally paralleling those applicable to cable television and intended to place satellite carriers in a comparable position to cable. Placing all local stations on contiguous satellite channels constitutes a requirement comparable to the cable requirement that all local stations be placed on the same basic tier. Congress understood that an identical provision would be impractical because satellite systems employ more sophisticated channel mapping than cable systems. Cable systems typically use familiar channels susceptible to tuning on a cable-ready set (e.g., 2-54). Satellite carriers use proprietary channel mapping (e.g., three-digit channel numbers) and tuning via electronic program guides, no doubt an outgrowth of their use of digital downlink transmissions and the resultant need for subscribers to acquire set-top boxes to process and downconvert the digital signals. Therefore, Congress devised a different, but equally effective requirement for satellite carriers. By requiring that all local stations be provided on contiguous channels, section 338(d) offers local television stations the same protection from discrimination and consumers the same tuning convenience and ready accessibility of local television stations' signals. However, if section 338 were read to permit discriminatory treatment of carry-one, carry-all stations *vis-a-vis* retransmission consent stations in the same local market, satellite carriers would enjoy considerably more flexibility than cable systems in channel placement of

³⁷Conf. Rep. at S14711.

³⁸Conf. Rep. at S14711.

local television stations. Thus, Congress's goal of establishing a comparable regulatory regime for satellite carriers and cable would be subverted.

Therefore, the requirement that all local stations be carried on contiguous channels is dictated not only by plain statutory language, but also by express congressional intent.

c. Sound public policy considerations support interpreting section 338 to encompass all television stations.

Reading section 338 correctly to encompass all local television stations is essential to preventing harm to local television stations – still a high priority for Congress.³⁹ The damage that flows from placing a local station at a disadvantageous channel position is no secret to Congress or the Commission.⁴⁰ A diminished potential audience leads to lower ratings and less advertising revenue – still the sole source of support for free broadcast television. The harm need not be life-threatening to impose a social cost. Lower revenues diminish the station's capacity to provide attractive programming responsive to community needs, interests, and tastes.⁴¹ Consequently, if satellite carriers were allowed to discriminate against carry-one, carry-all stations, the service provided by those stations would decline. This is particularly true in the case of local television stations that secure carriage under section 338 on January 1, 2002. At that time, the major network affiliates will have enjoyed carriage for several years. If the

³⁹Conf. Rep. at S14708.

⁴⁰H. Rep. 102-628, *supra*, at 51, 66; *see, e.g., TV/TYV, Inc.*, 13 FCC Rcd 22249, 22250 (1998).